

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: **Martin John Charles Offa-Jones** Confirmation No.: **4754**

Serial No.: **10/070,937**

Group Art Unit: **3677**

Filing Date: **June 4, 2002**

Examiner: **James R. Brittain**

For: **Reclosable Fasteners For Plastics Bags And Other Containers**

Mail Stop Appeal-Brief Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

APPELLANT'S BRIEF PURSUANT TO 37 C.F.R. § 41.37

This brief is being filed in support of Appellant's appeal from the rejections of claims 1 and 5 dated July 14, 2006. A Notice of Appeal was filed on October 13, 2006.

1. REAL PARTY IN INTEREST

Supreme Plastics Holdings Limited by virtue of the assignment recorded June 4, 2002, at Reel 013094, Frame 0596.

2. RELATED APPEALS AND INTERFERENCES

None.

3. STATUS OF CLAIMS

Claim 1 Rejected and On Appeal

Claim 5 Rejected and On Appeal

4. STATUS OF AMENDMENTS

Appellants did not file a response to the Final Office action dated July 14, 2006.

5. SUMMARY OF CLAIMED SUBJECT MATTER

The present application relates generally to reclosable fasteners (also known as zippers) for plastic bags. In the Background section of the Appellants' specification, the Appellants note that plastic bag zippers are:

... conventionally provided with a plurality of flanges on the two interengageable members which together make up the fastener. The most common practice is to provide four flanges, two on each member, in order to seal these flanges to film or web material on each side of the zipper. However, some zippers are provided with only three flanges, and some with only two.

Appellants' Published Application at para. [0003]. In contrast, Appellants' invention relates to a reclosable fastener having a single flange. *See e.g., id.* at para. [0011]; Claim 1. The advantage of a single flange is that the resulting zipper is less bulky. *Appellants' Published Application* at para. [0004]. Also, a single flange "provides increased internal strength to the bag by altering the angle at which the load in the bag acts against the zipper closure." *Id.* at para. [0011].

With this context in mind, Appellants note that sole independent Claim 1 recites:

A separable and **reclosable** fastener comprising a separable and **reclosable** male/female closure between a pair of opposed base members having interfitting male/female formations constituting the closure, wherein **a single flange for attachment of the closure to a web or film extends laterally from only one of the two base members**, and wherein each base member is provided with one single pair of ribs, one rib of each pair being positioned at a respective margin of the respective base member, the ribs being arranged to attach the fastener additionally to the web or film.

(emphasis added). In addition to the single flange, the claim specifies that the zipper/fastener must be capable of repeated opening and closing again (*i.e.*, it is "reclosable"). Claim 1 also recites that the flange can be attached only to one base member, and that each base member has a pair of ribs. *See Appellants' Published Application* at para. [0010].

Dependent Claim 5 specifies that "a layer of sealant material is co-extruded onto each rib." *See Appellants' Published Application* at para. [0010].

6. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

Whether the Examiner has demonstrated that Claim 1 is obvious over US Patent No. 4,673,383 ("the Bentsen reference") in view of US Patent No. 6,004,032 ("the Kapperman reference").

Whether the Examiner has demonstrated that Claim 5 is obvious over the Bentsen reference in view of the Kapperman reference, and further in view of US Patent No. 5,216,787 ("the Custer reference").

7. ARGUMENT

A. Whether the Examiner has demonstrated that Claim 1 is obvious over the Bentsen reference in view of the Kapperman reference.

Appellants submit that for all of Claim 1's breadth, the Examiner has been unable to provide a *prima facie* showing of obviousness. For example, neither the Bentsen reference nor the Kapperman reference teaches "a single flange ... extend[ing] laterally from only one of the two base members," as claimed.

The Examiner admits that **the Bentsen reference is a multiple-flange reference**. *See Final Office action* at page 2, lines 17-18 ("each has flanges extending from the base members."). In citing the Bentsen reference, the Examiner has merely corroborated Appellants' Background description of the state of the art, and acknowledged that the Bentsen reference is limited to a four flange reclosable zipper. Incidentally, Appellants submit that the stated application of Fig. 8 by the Examiner fails to properly address the claim language of a "flange for attachment of the closure to a web or film," but Appellants assume that it did for the sake of argument.

The Examiner then provides the Kapperman reference. In Fig. 11 of that reference, an un-numbered and un-described element is depicted on "female member 154" and alleged by the Examiner to be a flange. Even assuming it were a flange, and there is no indication in the reference that it is, the problem is that *there is no permissible suggestion or motivation to modify the Bentsen reference in view of the Kapperman reference*.

First, the combination is inoperable. One would have to replace the Bentsen reference's four flange base members with the Kapperman reference's flangeless male base member and alleged single-flange female base member to arrive at the invention. However, the Kapperman reference is not reclosable. The reference specifically states **that it is designed to prevent resealing!** *See, id.* at abstract and col. 1, line 42-44 ("one of the male or

female profiles breaks, to prevent a resealing of the package"). More specifically, regarding the embodiment of Fig. 11, the Kapperman reference states that:

In other words, **male and female profiles 152, 154 lack flanges attaching them to the package walls 156, 158** and which are accessible to the user. Thus, the user has nothing to grasp to apply a pulling force in order to separate the male and female profiles 152, 154. If an attempt is made by the user to separate the male and female profiles 152, 154, the relative strength of the locking engagement between the male and female profiles 152, 154 will be greater than the tear strength of the package walls 156, 158. ***As such, the package walls 156, 158 will tear before the closure profiles 152, 154 can be separated.***

Id. at col. 10, lines 37-48 (emphasis added). Thus, it teaches away from the Examiner's interpretation, and more importantly, from combination with the Bentsen reference, as it will destroy the function of the primary reference. In such a case, the Office's procedure, as well as the relevant case law, is clear, the reference may not be applied. *See* MPEP §2143.01 (no suggestion or motivation can be present if the proposed modification would render the prior art invention being modified inoperable or otherwise unsatisfactory for its intended purpose).

Second, the rejection fails to recite a proper motivation. The MPEP provides that "there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings." MPEP §2143. Appellants take issue with the Examiner's proposed motivation for the combination based on "a particular asymmetric flexibility." This contention is completely unsupported by either reference.

Because the Kapperman reference's bump is not described, no one knows why it is there, whether it even is a flange (note that we are specifically told by the reference (above) that female member 154 lacks flanges), and whether it provides "particular asymmetric flexibility," whatever that may be. Rejections must be based on evidence. MPEP §2142 ("the examiner must provide evidence which as a whole shows that the legal determination sought to be proved (i.e., the reference teachings establish a *prima facie* case of obviousness)

is more probable than not."). The Bentsen reference evidently failed to recognize any benefit to asymmetry as its flanges are symmetrical. To modify the Bentsen reference's arrangement based on the entirely undisclosed benefits of the Kapperman reference's alleged flange is not credible; the Kapperman reference does not discuss asymmetry, in fact, it states that female member 154 lacks flanges.

Thus, since the references themselves fail to provide a motivation to modify them, a proper rejection required the Examiner to come forth with evidence to support his "particular asymmetric flexibility" hypothesis as a matter of general knowledge. He did not. Accordingly, the rejection was improper, and strongly suggests impermissible hindsight.

B. Whether the Examiner has demonstrated that Claim 5 is obvious over the Bentsen reference in view of the Kapperman reference, and further in view of the Custer reference.

As a dependent claim, Claim 5 enjoys the limitations of Claim 1, and therefore has not been demonstrated as obvious for the reasons above regarding the Bentsen reference and the Kapperman reference.

In short, as noted above, the Bentsen reference and the Kapperman reference cannot be combined for at least one of two reasons. First, the combination is not operable. Second, there is no motivation in the references to combine them, and no evidence to support the Examiner's "particular asymmetric flexibility" reasoning.

In addition, the Custer reference cannot be combined with the Kapperman reference. Like the Bentsen reference, the Custer reference is directed to reclosable packages. In contrast, the Kapperman reference can never be re-closed, it is closed once, then destroyed upon opening (hence, tamper-evident). As a result, it teaches away from the combination and away from the claimed invention.

8. CLAIMS APPENDIX

1. (Rejected and On Appeal) A separable and reclosable fastener comprising a separable and reclosable male/female closure between a pair of opposed base members having interfitting male/female formations constituting the closure, wherein a single flange for attachment of the closure to a web or film extends laterally from only one of the two base members, and wherein each base member is provided with one single pair of ribs, one rib of each pair being positioned at a respective margin of the respective base member, the ribs being arranged to attach the fastener additionally to the web or film.

2-4. (Canceled).

5. (Rejected and On Appeal) A reclosable fastener as claimed claim 1, in which a layer of sealant material is co-extruded onto each rib.

9. EVIDENCE APPENDIX

None.

10. RELATED PROCEEDINGS APPENDIX

None.

11. SIGNATURE PAGE

Date: December 13, 2006

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